Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Interconnection and Resale	)	CC Docket No. 94-54
Obligations Pertaining to Commercial	)	
Mobile Radio Services	)	

COMMENTS OF GTE

GTE Service Corporation on behalf of
its telephone and wireless companies

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June 14, 1995

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SUMMARY

GTE generally agrees with the Commission's assessment of the CMRS marketplace and supports the proposals set forth in the *Second NPRM.*

GTE strongly supports the Commission's tentative decision not to impose a specific interstate interconnection obligation on CMRS providers. GTE applauds the Commission's willingness to allow competition to transplant regulation in the CMRS marketplace. Market conditions will ensure that interconnection arrangements are forged among CMRS competitors when economic conditions warrant them. GTE urges the FCC to preempt state-mandated interconnection requirements. Preemption is necessary to prevent state regulation from undermining federal policy and is consistent with past FCC decisions.

GTE fully supports the Commission's decision to allow market forces rather than regulation to govern roaming arrangements. As was the case in the cellular industry, the marketplace will ensure that all CMRS providers are able to negotiate roaming arrangements with other carriers.

GTE supports the Commission's tentative decision to adopt a resale obligation for all CMRS providers except air-ground providers. However, in order to protect start-up PCS licensees, GTE urges the Commission to state that the resale obligation may not be used as a tool to frustrate the business plans and investment decisions of the licensee.

GTE believes that differences between air-ground service and other CMRS justify excluding air-ground service providers from the CMRS resale requirement. Accordingly, GTE believes that such an exclusion would not violate either section 201(b) or section 202(a) of the Communications Act.

GTE agrees with the Commission that a sunset date should apply to the obligation of a facilities-based carrier to permit another such carrier to resell its services. GTE suggests, that for the 1.8 GHz PCS market, there is no reason to require resale to a facilities-based carrier after five years from the date the license is issued.

GTE believes that requiring CMRS providers to interconnect their switches directly with reseller switches would impose significant costs while providing little, if any, benefits to consumers. Accordingly, GTE supports the Commission's tentative conclusion not to adopt the so-called "reseller switch proposal." GTE also asks the Commission to clarify that state regulatory authorities are preempted from adopting reseller switch interconnection requirements.

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COMMENTS OF GTE

GTE Service Corporation ("GTE"), on behalf of its telephone and wireless companies, hereby submits its Comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Second Notice of Proposed Rulemaking* ("*Second NPRM*") in the above-captioned proceeding.[1] The *Second NPRM* considers whether to adopt interconnection, roaming, and resale obligations for providers of commercial mobile radio services ("CMRS"). The Commission proposes that no specific interconnection or roaming requirements should be adopted at this time, but proposes to adopt a resale policy for all CMRS providers similar to the resale requirement currently imposed upon cellular carriers. GTE generally agrees with the Commission's assessment of the CMRS marketplace and supports the proposals set forth in the *Second NPRM.*

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[1] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Second Notice of Proposed Rulemaking*, CC Docket No. 94-54, FCC 95-149 (released April 20, 1995).

I. BACKGROUND

The Commission initiated this proceeding in the wake of the Omnibus Budget Reconciliation Act of 1993 ("OBRA").[2] The Budget Act amended section 332 of the Communications Act of 1934 ("the Act") by requiring that the Commission respond to requests of CMRS providers to establish physical connections with common carriers pursuant to section 201 of the Act.[3] In the FCC proceeding implementing relevant portions of the Budget Act, the Commission adopted a rule requiring local exchange carriers ("LECs") "to provide the type of interconnection reasonably requested by all CMRS providers."[4] The Commission, however, put off for a separate proceeding, the issue of whether to require CMRS providers to interconnect with one another.[5]

In July of 1994, the Commission opened the instant proceeding by releasing a *Notice of Proposed Rulemaking* proposing equal access obligations for certain CMRS providers ("*Equal Access NPRM*") and a *Notice of Inquiry* asking whether the Commission should impose an interconnection obligation on CMRS providers ("*Interconnection NOI*").[6]

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2 Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312 (1993).

3 47 U.S.C. §§ 332(c)(1)(B), 201(a).

4 Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1498 (para. 230) (1994). ("*CMRS Second Report and Order*").

5 *Id.* at 1499-1500.

6 Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service, *Notice of Proposed Rulemaking and Notice of Inquiry*, CC Docket No. 94-54, 9 FCC Rcd 5408 (1994).

On September 12, 1994, GTE filed Comments in response to the *Equal Access NPRM* and the *Interconnection NOI*. With respect to CMRS interconnection, GTE argued against a specific interconnection obligation. GTE asked the Commission to continue to allow market factors to govern the interconnection of CMRS providers with one another.[7] GTE also argued that CMRS resellers should not be allowed to interconnect directly with CMRS licensee switches,[8] and that air-ground service providers should be exempt from CMRS resale requirements.[9]

The *Second NPRM* was adopted in response to comments and replies to the *Interconnection NOI*. There the Commission proposed not to adopt rules of general applicability requiring direct interconnection between CMRS providers. The Commission also proposed not to adopt any regulation requiring roaming arrangements between CMRS providers. Finally, the Commission proposed to adopt a resale obligation for CMRS providers, sought comment on the nature of the resale obligation between facilities-based CMRS providers, and proposed that CMRS providers not be required to interconnect their switches to reseller switches.

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7 GTE Comments, September 12, 1994, at 46.

8 *Id.* at 46-47.

9 *Id.* at 47-53.

II. DISCUSSION

A. Interconnection

1. GTE Strongly Supports the Commission's Decision Not to Impose an Interstate Interconnection Requirement on CMRS Providers

In the *Second NPRM*, the Commission stated that interconnectivity of mobile communications networks promotes the public interest, and that it wanted to "establish a framework under which the benefits of interconnection are realized primarily through private negotiations and arrangements."[10] Accordingly, the Commission tentatively concluded that no interstate interconnection obligation should be imposed on CMRS providers at this time.

The Commission based this conclusion on a number of factors, including: (1) the nascency of the CMRS industry and the uncertain affect of imposing an interconnection obligation at this time; (2) the availability of interconnection through LEC networks; (3) the absence of market conditions that would lead CMRS providers to deny one another interconnection; and (4) the availability of the section 208 complaint process to review contested or unresolved requests for interconnection.[11]

GTE strongly supports the Commission's tentative decision not to impose a specific interstate interconnection obligation on CMRS providers. In reaching its decision, the Commission stated that because CMRS will be provided on a competitive basis by multiple facilities-based competitors in each license area in

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[10] *Second NPRM* at 16 (para. 28).

[11] *Id.* at 16-18, 20-23.

the near future, there is little need for regulatory intervention.[12] Indeed, the Commission stated that "we fully expect all CMRS providers to behave in an economically rational manner and to implement direct and efficient network connections at reasonable costs when the opportunity and need arise. For now, we are confident that the decision of interconnection 'where warranted' is best left to the informed business judgment of the carriers themselves."[13]

GTE applauds the Commission's willingness to allow competition to transplant regulation in the CMRS marketplace. GTE believes that market conditions will ensure that interconnection arrangements are forged among CMRS competitors when economic conditions warrant them. GTE concurs with the Commission that a specific interstate interconnection requirement is not necessary for CMRS providers for several reasons.

First, as noted above, vigorous competition will make it extremely difficult for a CMRS provider to obtain a significant size advantage over its rivals. As the Commission has recognized, for a provider to have an incentive to act in an anticompetitive manner and to profit from denying interconnection to a rival, it must have market power (i.e., a significant size advantage).[14]

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12 *Id.* at 19 (para. 36).

13 *Id.* at 19-20 (para. 37).

14 The Commission theorizes that, if the cost of direct interconnection were less than interconnection through the LEC, a firm could raise a rival's costs by denying direct interconnection. Unless one firm originates significantly more traffic than its rivals, denying interconnection would only serve to raise the costs of both firms. Thus, the Commission states, "unless considerable difference exists in market share among CMRS firms, the firms will probably gain more from jointly lowering their own costs through allowing direct interconnection than from raising rivals' costs by denying it." *Id.* at 17-18 (para. 32).

Such conditions are unlikely in the wireless marketplace. Since its inception in the early 1980s, the cellular industry has seen volume and capacity increases, service offerings expand, and numerous technological advances, all while monthly subscriber expenditures on cellular service have decreased from about $500 per month in 1984, to about $60 per month in December 1993.[15] Thus, the performance of the current cellular marketplace has been consistent with what would be expected in a competitive market.[16]

The advent of PCS and enhanced SMR offerings will further increase competition in the mobile services marketplace. PCS will change the mobile services market structure by adding several new mobile service competitors in each license area. Indeed, recently, in denying an application by the California Public Service Commission to retain regulatory authority over intrastate cellular rates, the Commission stated that any competitive analysis of the cellular industry must "consider the immediate and near term impact of PCS."[17] Noting lower prices and improved technology in the cellular market, the Commission remarked that "the advent of PCS appears unambiguously to be having an impact on the present marketplace. . ."[18]

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15 Stanley M. Besen, Charles River Associates; Concentration, Competition, and Performance in the Mobile Telecommunications Services Market (September 9, 1994) (Attached as Appendix A to GTE's Comments, filed September 12, 1994, CC Docket 94-54) ("*Besen Paper*") at 5-9.

16 *Id.* at 1.

17 Petition of the People of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, *Report and Order,* PR Docket No. 94-105, FCC No. 95-195 (released May 19, 1995) at 17 (para. 31) ("*California Preemption Order*").

18 *Id.* at 19 (para. 33).

In addition, the deployment of enhanced SMR technologies and consolidation of SMR frequencies will enable wide-area SMR providers to compete for customers with cellular and PCS. These aggressive new competitors in each license area will further diminish the likelihood that any one CMRS provider can gain an advantage by denying interconnection to a rival.

A second reason why a specific interconnection requirement is not necessary is that CMRS providers can interconnect indirectly with other CMRS providers through the LEC network.[19] GTE agrees with the Commission that the availability of LEC interconnection obviates the need for a direct interconnection requirement by ensuring that all CMRS providers can terminate traffic on other mobile services networks, and by eliminating most, if not all, of the potential benefit to be gained by denying direct interconnection.

Third, adopting an interconnection obligation for CMRS providers may prove harmful. As the Commission noted, "the CMRS industry is undergoing rapid change . . . How some of these new mobile services will operate and compete with other services remains uncertain."[20] An interconnection obligation imposed at this stage of the development of many CMRS providers may affect the technology selection process and impede the development and deployment

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19 GTE urges the Commission to allow LECs and CMRS providers to forge interconnection arrangements through good faith negotiation rather than requiring LECs to provide interconnection under tariff. *See* GTE Comments, September 12, 1994, at 38-43.

20 *Second NPRM* at 16 (para. 29).

of advanced technologies that may initially be more difficult to interconnect with other mobile systems.

Moreover, for most CMRS providers, direct interconnection with other CMRS providers may not be economically viable for several years. Until mobile systems begin to terminate significant traffic volumes on one anothers' networks, interconnection through the LEC will likely remain the most technically and economically efficient means of interconnection. Thus, any mandatory interconnection requirement could hinder rather than help the CMRS industry.

Fourth, an interconnection requirement should not be adopted in the absence of evidence that the marketplace has failed to ensure that rival firms will be willing to interconnect with one another. It is a long-standing principal of economic theory that regulators should only regulate where markets fail. GTE believes that the marketplace will ensure that reasonable interconnection requests among CMRS providers will be granted. In the absence of evidence to the contrary, GTE believes that the Commission is correct in deciding to allow the marketplace to determine firms' interconnection arrangements with one another.

Finally, a specific interconnection requirement is unnecessary because the Commission has the authority to take actions to ensure that reasonable requests for interconnection are granted. The Commission states, and GTE agrees, that the FCC is authorized, under section 208 of the Communications Act, to investigate complaints alleging that a denial of interconnection was unreasonable -- in violation of section 201(b) -- or unreasonably discriminatory --

in contravention of section 202(a).[21] Accordingly, should situations arise where CMRS providers fail to agree on a direct interconnection arrangement, the Commission may deal with such situations on a case-by-case basis, and order interconnection where it determines a reasonable request has been denied.

In applying its statutory authority, GTE urges the Commission to consider the circumstances behind any interconnection disputes. GTE believes that FCC enforcement action should be limited to situations where evidence shows that interconnection was unreasonably denied in order to effect some anticompetitive purpose. Commission enforcement policy should recognize that unreasonable economic hardship and technological difficulties are valid reasons for failing to interconnect.

2. Determinations of the Relevant Geographic and Product Markets Must be Made on a Case-by-Case Basis

The Commission indicated, in addressing requests for interconnection, that it will closely examine market power of the firms involved.[22] Accordingly, the Commission asked parties to comment on the relevant product market and geographic market for CMRS services. While GTE understands that the relevant product and geographic market must be determined in order to assess whether an action has an anticompetitive effect, it believes that the concepts of relevant product and geographic markets are far from static. Accordingly, GTE submits that such determinations must be made on an individual case basis.

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21 *See* 47 U.S.C. §§ 201(b), 202(a), and 208.

22 *Second NPRM* at 22 (para. 42).

The communications industry in general, and the CMRS marketplace in particular, are growing and changing at a rapid rate: new products and services are being developed constantly, new firms are entering markets, mergers and acquisitions are taking place. The CMRS industry consists of markedly different providers offering different services in different geographic areas. As such, it is not possible to define which CMRS products will be substitutable for other products over time, or to define a relevant geographic market that will be applicable to all CMRS providers on a going forward basis. Accordingly, GTE does not believe the Commission should attempt to identify the relevant product and geographic markets for the entire CMRS industry. Rather, the Commission should examine each case individually and determine the relevant product and geographic markets based on the circumstances existent at the time of any suspect action.

3. LEC-Affiliated CMRS Providers are Unlikely to Deny Interconnection to Rival Firms

In the *Second NPRM,* the Commission stated that LEC affiliation with a CMRS provider will be an important factor in its assessment of whether a denial of interconnection by the CMRS provider was lawful. The Commission is concerned that LEC-affiliated CMRS providers may deny interconnection in order to keep CMRS traffic on the LEC network.[23]

Notwithstanding these concerns, GTE believes the Commission was correct in its decision not to impose an interconnection obligation on LEC-

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[23] *Id.* at 22-23 (para. 43).

affiliated (or any other) CMRS providers. GTE's interconnection decisions are based on the economic cost of direct versus indirect interconnection and on the technical feasibility of direct interconnection; whether the provider of indirect interconnection is an affiliated company does not enter into the equation. Moreover, the competitiveness of the CMRS industry and the growing number of competitive alternatives in the local exchange industry should prevent any carrier from profiting from such a strategy. Finally, as the Commission noted, denial of interconnection by LEC-affiliated CMRS providers will be closely scrutinized. As a result, any attempt at anticompetitive behavior can be dealt with through the complaint process.

4. The FCC Should Preempt any State-Imposed CMRS-to-CMRS Interconnection Obligations

GTE believes that preemption of state-imposed interconnection requirements is essential to prevent state regulation from undermining federal policy and is consistent with past FCC decisions. Becausee the facilities used to provide intrastate CMRS are also used to provide interstate service, there is no practical way to divide regulatory jurisdiction over interconnection. As such, any state-imposed interconnection requirements would frustrate the Commission's tentative decision to allow the marketplace to influence such matters. Moreover, different state regulations could inhibit the deployment of PCS services and result in costly delays to CMRS providers' build-out plans.

FCC preemption of state-imposed CMRS-to-CMRS interconnection requirements would also be consistent with past Commission action. In

particular, in 1987, the Commission preempted state regulation of cellular carrier-to-LEC interconnection arrangements.[24] The Commission justified the preemption, stating, "cellular physical plant is inseparable and thus Section 2(b) [of the Communications Act] does not limit our jurisdiction in this area. . . [i]t would not be feasible to require one set of trunk lines and equipment for intrastate calls and another for interstate calls."[25] The Commission found, further, that a nationwide interconnection policy was necessary to ensure cellular system access to the interstate public telephone network, and to help prevent increased costs and diminished signal quality.[26] Consistent with that decision, the Commission must also find that CMRS-to-CMRS interconnection agreements are not capable of being regulated at both the federal and state levels.

B. Roaming

1. GTE Supports the Commission's Decision Not to Adopt a Roaming Requirement at this Time

In the *Second NPRM,* the Commission stated that while it believes it should take any steps necessary to support roaming, no regulatory action is required at this time. The Commission reasoned that the market should provide

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24 The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Declaratory Ruling,* Report No. CL-379, 2 FCC Rcd 2910 (1987) (*"Cellular Interconnection Order"*).

25 *Id.* at 2912 (para. 17).

26 *Id.* The Commission affirmed its preemption policy on reconsideration. *See* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding), *Memorandum Opinion and Order on Reconsideration,* Report No. CL-379, 4 FCC Rcd 2369 (1989).

incentives for CMRS providers to enter into roaming arrangements and that market forces rather than regulation, at least at the outset, should be relied on to address the technical issues associated with roaming service.[27]

GTE fully supports the Commission's decision to allow market forces rather than regulation to govern roaming arrangements. GTE long ago realized the benefits of providing end users with roaming capabilities. In fact, GTE has been a leader in the cellular industry's efforts to institute nationwide roaming capabilities.[28]

GTE agrees with the Commission that, as was the case in the cellular industry, the marketplace will ensure that all CMRS providers are able to negotiate roaming arrangements with other carriers. GTE believes that new CMRS providers choosing to offer subscribers roaming service will not be denied such service by existing carriers -- assuming any technical problems can be resolved -- because it will be in the economic interest of each carrier to provide ubiquitous roaming capabilities to its subscribers.[29]

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27 *Second NPRM.* at 28 (paras. 54-56).

28 For example, in June 1988, GTE Telecommunications Services, Inc. introduced "Follow Me Roaming Service." This patented breakthrough was the cellular industry's first system enabling cellular customers to automatically receive calls when traveling outside of their "home" cellular system. This innovation won the 1989 ComForum Award, recognizing products deemed "most beneficial to the industry." More recently, GTE introduced "Follow Me Roaming Plus," a call delivery service that utilizes the IS-41 standard. This service permits automatic activation of call delivery services based on autonomous registrations (call origination or terminations). As of February, 1995, GTE offered automatic call delivery in 2,100 cities in the United States and Canada.

29 GTE believes that, eventually, carriers not offering roaming service will be at a disadvantage. Therefore, each carrier will have an economic incentive to enter into roaming agreements with other CMRS providers.

The cellular industry's development of the IS-41 standard stands as an example of how economic forces led to the development of a network that enables seamless cellular roaming service.[30] Because vendors helped develop the IS-41 standard and are familiar with it, CMRS providers may choose any vendor to build a network consistent with the standards and backbone structure that already exists. CMRS providers choosing to implement network technologies compatible with the IS-41 standard likely will not experience technical difficulties in making roaming arrangements.

The Commission should realize, however, that entities choosing to construct their networks using technologies not compatible with the IS-41 standard may experience technical problems, and may not immediately be able to offer ubiquitous roaming to subscribers.[31] Nonetheless, as noted above, GTE believes that the CMRS industry has an economic incentive to resolve any such technical problems and will be able to do so without need of Commission intervention.

2. Section 22.901 Does Not Require Cellular Licensees to Provide Service to Roaming PCS Subscribers

The Commission seeks comment in the *Second NPRM*, regarding whether section 22.901 of its rules[32] requires cellular licensees to provide

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30 *See Second NPRM* at 26 (para. 51), *citing* Comments of Southwestern Bell.

31 Carriers picking technologies not currently compatible with IS-41, however, will do so knowing the possible implications such choices have on roaming capabilities.

32 47 C.F.R. § 22.901.

service to roaming PCS subscribers.[33] The Commission's inquiry arises as result of comments suggesting that a cellular provider may not be able to distinguish between a cellular subscriber and a PCS subscriber using a hand-set capable of transmitting and receiving communications on cellular frequencies -- commonly referred to as a "dual-band" hand-set.

While GTE has no intention of denying roaming service to PCS subscribers, it does not believe that the current rule requires a cellular licensee to provide such service. The rule states that "[c]ellular system licensees must provide cellular mobile radiotelephone service upon request to all *cellular subscribers* in good standing, including roamers, while such subscribers are located within any portion of the authorized cellular geographic service area ..."[34] Because the rule only applies to cellular subscribers, it only requires cellular licensees to serve cellular subscriber roamers. Thus, while it may not be possible in some cases to distinguish between a cellular and a PCS roamer, GTE believes that Commission Rule section 22.901 only applies to cellular roamers.

Nor does GTE believe that a rule should be crafted requiring cellular carriers to provide roaming service to PCS customers. Given that PCS licensees will select any of a multitude of technologies (including AMPS, TDMA, CDMA, GSM), there will be practical and technical hurdles to overcome to

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33 *Second NPRM* at 28-29 (para. 57).

34 47 C.F.R. § 22.901 (emphasis added).

enable PCS-cellular roaming. As stated previously, GTE believes that the CMRS industry has an economic incentive to resolve any technical problems and will be able to do so without need of Commission intervention.

C. Resale

1. The Resale Obligations of Cellular Providers Should Apply to all CMRS Providers Except Air-Ground Providers

In the *Second NPRM,* the Commission tentatively concluded that the existing rule requiring cellular providers to permit resale should be extended to apply to all CMRS providers unless there is a showing that resale would not be technically feasible or economically reasonable.[35] In reaching its decision, the Commission relied upon a line of FCC decisions finding that denial of resale is an unreasonable practice, in violation of section 201(b) of the Communications Act, and constitutes unreasonable discrimination, in violation of section 202(a) of the Act. The Commission also reiterated past decisions finding that allowing resale promotes competition.[36]

In comments filed earlier in this proceeding, GTE, noting the Commission's long history of pro-resale decisions, asked the Commission to extend its resale policy to all CMRS providers except air-ground providers.[37] GTE has long-advocated Commission policies that promote regulatory parity

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35 *Second NPRM* at 42-43 (para. 83).

36 *Id.* at 42-44.

37 GTE Comments, September 12, 1994, at 48-49.

among providers of similar services.[38] Accordingly, GTE supports the Commission's tentative decision to adopt a resale obligation for all CMRS providers.[39] GTE also agrees with the Commission that exceptions to this rule should only be granted in circumstances where a particular class of carriers is able to show that resale is either not technically feasible or economically reasonable.

In implementing and enforcing its resale policy, however, GTE believes that the Commission should consider all of the circumstances attendant to a denial of service prior to finding that such denial constitutes a violation of the resale policy. GTE is particularly concerned that, in the PCS context, unlicensed competitors may use the resale obligation in attempt to alter a start-up PCS licensee's build-out investment decisions. For example, an entity may attempt to purchase capacity from a PCS licensee in a particular area in order to attempt to require the PCS licensee to construct more facilities in that location than the licensee originally planned. Once the facilities are built, the reseller could then

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38 *See, e.g.,* Amendment of Part 90 of the Commission's Rules Governing Eligibility for the Specialized Mobile Radio Services in the 800 MHz Land Mobile Band, Notice of Proposed Rulemaking, PR Docket 86-3, 51 Fed.Reg. 2910 (January 22, 1986), GTE's Comments, May 19, 1986, at 2-3; Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, Petition for Reconsideration in Part (filed May 30, 1991 by GTE Service Corporation); Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, GTE's Comments, May 28, 1993, at 4-5; Requests for Waiver of Section 90.603(c) of the Commission's Rules to Permit Wireline Common Carriers to Hold SMR Licenses, DA 94-329, GTE's Reply Comments, filed June 3, 1994; Eligibility for the Specialized Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, GTE's Comments, October 5, 1994, at 4-6.

39 As discussed below, however, GTE continues to believe that an exception to the resale policy should be made for air-ground service providers.

stop taking service, creating stranded capacity for the start-up PCS licensee. To protect the start-up PCS licensee from this practice, the Commission should adopt a policy that the resale obligation may not be used as a tool to frustrate the business plans and investment decisions of the licensee.

2. Resale Should Not Be Required of Air-Ground Service Providers

GTE believes that air-ground service providers qualify for exception from the CMRS resale requirement. GTE previously argued that the resale requirement should not apply to air-ground providers because of technical issues preventing resale in the air-ground context and because healthy competition already exists among air-ground service providers.[40]
In response to GTE's arguments, the Commission sought comment in the NPRM on whether the technical considerations raised with regard to air-ground service are sufficient to permit restrictions on the resale of air-ground service and whether such restrictions would violate section 201(b) and section 202(a) of the Communications Act.[41]

GTE believes that excluding air-ground service providers from the CMRS resale requirement is justified and would not violate either section 201(b) or 202(a). Section 201(b) of the Act proscribes charges or practices that are unjust or unreasonable.[42] Section 202(a) of the Act protects against unjust or

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40 GTE Comments, September 12, 1994, at 49-53.

41 *Second NPRM* at 44 (para. 87).

42 47 U.S.C. § 201(b).

unreasonable discrimination.[43] Thus, a determination that any act or practice violates either of these statutory provisions turns on whether such act or practice is just and reasonable. GTE believes that differences between air-ground service and other CMRS justify excluding air-ground service providers from the CMRS resale requirement.

A resale requirement would be difficult, if not impossible, to impose in the air-ground context, because air-ground service providers use incompatible equipment. Unlike cellular service, where some compatibility standards exist,[44] the Commission has allowed air-ground service providers to maintain private technical standards and has acknowledged that such information "can be proprietary."[45] Thus, contrary to cellular service, the handsets and other equipment used by the each existing air-ground provider is not compatible with other providers' networks.[46]

Equipment compatibility is necessary for resellers to send traffic over the facilities of existing air-ground providers. In order for a resale requirement to work in the air-ground context, compatibility standards similar to those applicable to cellular service would have to be adopted. GTE believes that any such

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43 47 U.S.C. § 202(a).

44 Section 22.933 of the Commission's Rules, for example, requires that all cellular equipment be capable of operating in any cellular system in the United States. 47 C.F.R. § 22.933.

45 Amendment of the Commission's Rules Relative to Allocation of the 849--851/894-896 MHz Bands, *Report and Order,* Gen Docket No. 88-96, 5 FCC Rcd 3861, 3874 (para. 101) (1990) ("*Air-Ground Order*").

46 For example, air-ground handsets are only capable of operating on their own systems.

requirements would bring more harm than good. In particular, replacing existing equipment with facilities that are compatible with other systems would be extremely costly. Moreover, compatibility standards would force service providers to share technological information with other providers, thus removing incentives for technological innovation.[47]

In addition, resale of air-ground service is not feasible because of the limited capacity available for air-ground service. Air-ground capacity is a function of both the number of "communications lines" available on board each aircraft, and the spectrum available for air-ground service. The number of communications lines available depends on the number of transceivers on board each aircraft and on the technology deployed. Aircraft outfitted with today's digital technology are capable of handling no more than 16 calls at one time. The requirement that air-ground providers share spectrum further limits capacity. The Commission requires air-ground service providers to share the narrow band of spectrum that has been allocated to air-ground service.[48] Because spectrum is shared, capacity in use by one provider necessarily diminishes the capacity available to other service providers.

Resellers generally compete with facilities-based carriers by purchasing bulk capacity at low rates and selling smaller increments of that capacity to end users at rates comparable to those being charged by the underlying carrier.

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47 Even if equipment were compatible, commercial airlines have been unwilling to carry more than one type of air-ground radio handset.

48 *Air-Ground Order* at 3868-3869.